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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 690

HERBERT J. SMITH, ET AL., *Appellants*

v.

WILLARD AYRES, Mayor, etc., ET AL., *Appellees*

On Appeal from the Supreme Court of Florida

BRIEF IN SUPPORT OF MOTION TO DISMISS

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IN THE

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No.

HERBERT J. SMITH, ET AL., *Appellants*

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BRIEF IN SUPPORT OF MOTION TO DISMISS

On Appeal from the Supreme Court of Florida

I. SCOPE OF BRIEF

Appellants, within the time prescribed by Supreme Court rules, filed their appeal herein and have submitted the jurisdictional statement required by paragraph 2 of Rule 13, Supreme Court Rules. This brief is addressed to Motion to Dismiss filed by Appellees pursuant to Rule 16. A copy of the Motion to Dismiss is in the Appendix to this brief, pages 1a-2a.

II. QUESTIONS PRESENTED BY MOTION TO DISMISS

The Motion to Dismiss filed herein by Appellees is based upon two grounds:

1. Whether there is a substantial federal question involved.
2. Whether the judgment entered by the Supreme Court of the State of Florida rests on an adequate non-federal basis.

III. STATEMENT OF FACTS OF THE CASE

Chapter 29326, Laws of Florida, 1953, provides a method of annexation of territory by referendum to the corporate limits of the City of Ocala, Florida. The Act requires the enactment of an ordinance by the City Council describing the territory proposed to be annexed, the date of the election, the effective date of the annexation (if successful) and other terms and conditions. The Act also requires that the ordinance provide for and call an election, and that the Mayor's Proclamation containing a copy of the ordinance and calling such election be published once a week for four consecutive weeks prior to such election in a newspaper of general circulation published in the City of Ocala. A copy of this Act is in the Appendix to this brief.[1]

Pursuant to said Act of the Legislature of the State of Florida, the City Council of Ocala (the governing body of the municipality) enacted Ordinance No. 238, which set forth the requirements of the election as provided by the Act, and the Mayor's Proclamation calling for the election was published as provided by the Legislative Act. It is to be noted that the Mayor's Proclamation requires the publication of Ordinance No. 238 in full once a week for four consecutive weeks prior to the election. A copy of

[1] Pages 3a through 7a.

Ordinance No. 23 is in the Appendix to this brief, pages 8a through 17a.

Ordinance No. 238 also contained a provision that notice of the election be given by publication in a newspaper within not less than fifteen nor more than twenty days prior to the date of the election. Other ordinances of the City pertaining to *special* elections provided for a notice to be given as aforesaid prior to the date of the election. In the initial pleading of the case before the Chancellor in the Circuit Court of Marion County, Florida, it was admitted that neither of the latter publications were made by the City of Ocala.[2]

Ordinance No. 238 provided for an election to be held upon the annexation of two separate areas and qualifications of voters upon each election was prescribed in the ordinance. At the time prescribed in the ordinance the election was held and a majority of the electorate voting in each election approved the annexation of both areas to the City of Ocala.

Appellants thereupon initiated proceedings in the Circuit Court of the Fifth Judicial Circuit of Marion County, Florida, seeking to have the election set aside, and upon an adverse decision appealed to the Florida Supreme Court which adopted the Lower Court decree in its affirmation. A copy of the opinion of the Supreme Court is set forth in the Appendix, pages 18a through 27a.

IV. APPELLANTS' CONSTITUTIONAL OBJECTIONS WERE CONSIDERED IN THE PROCEEDINGS BELOW.

Appellants have attacked the validity of the annexation proceedings based upon two clauses of the Constitution of the United States:

[2] See opinion of Supreme Court of Florida where this is recited in facts, Appendix page 18a.

1. The equal protection of the laws clause in Section 1, Amendment XIV; and

2. The due process clause in Amendment XIV.

The Declaration of Rights of the Constitution of the State of Florida grants to the citizens of Florida the same protection afforded by the Constitution of the United States.[3]

In both the Trial Court of the State of Florida and in the Florida Supreme Court state and federal constitutional objections to the procedures and methods of the annexation of the areas to the City of Ocala were considered and found to be without merit.[4]

[3] *Declaration of Rights, Florida Constitution*

Section 1. Equality; inherent rights.—All men are equal before the law, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property and pursuing happiness and obtaining safety.

Section 4. Courts open to everyone; remedy for wrongs.—All Courts in this state shall be open, so that every person for any injury done him in his lands, goods, person or reputation, shall have remedy, by due course of law, and right and justice shall be administered without sale, denial or delay.

[4] See Appendix pages 20a, 21a, and 22a. Even the dissent of Justice Barns was based upon his opinion that Chapter 29326, Laws of Florida, 1953, was in violation of the Constitution of Florida because it delegated a power reserved to the legislature, not because of personal "guarantees" of due process or equal protection of law provisions.

V. THE ISSUES DO NOT PRESENT SUBSTANTIAL FEDERAL QUESTIONS

1. *Annexation—a plenary power of the legislature.*

In *Hunter v. City of Pittsburg, Pa.*, 207 U.S. 161, 28 S. Ct. 40, 52 L. Ed. 151, this Court recognized the exclusive "jurisdiction" of state legislatures to prescribe for and regulate its political subdivisions:[5]

"Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their characters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the Federal Constitu-

[5] An act of the State of Pennsylvania authorized the union of cities which were contiguous or in close proximity to each other by the annexation of the lessor in size to the larger. The tabulation of votes upon the consolidation election required a majority of those voting in the two cities and the intervening land to approve the consolidation. As in the case before this Court, the Appellants complained that the method of voting was unfair, unjust, and unequal, and in conflict with the rights and privileges reserved to people in that it permitted the qualified electors of the larger city to overpower and outnumber those of the lesser city, and to annex the lesser city without the vote or consent of the majority of the qualified electors of the lesser city. The judgment of the Supreme Court of Pennsylvania which directed the consolidation of the cities of Pittsburgh and Allegheny was affirmed.

tion. The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it."

Although power of annexation is regarded as exclusively a legislative function, it is not absolutely unlimited. The Courts of Florida have intervened where limitations imposed by the Constitution have not been observed. Thus annexation of territories have been declared invalid when lands are uninhabited and not needed for municipal purposes[6]; where the areas receive no benefits for municipal taxation[7]; and where power of annexation is not exercised in strict accord with the statute confirming it.[8]

[6] *State ex rel Davis v. Largo,* 110 Fla. 21, 149 So. 420 (1933).
[7] *Davis v. Stuart,* 97 Fla. 69, 120 So. 335, 64 A.L.R. 1307. (1929).
[8] *Magonia Park v. Homan,* 118 So. 2d. 585 (1960 Fla. App.)

Likewise this Court has held that Legislative control of municipalities is not without limitations, but lies within the scope of relevant limitatons imposed by the United States Constitution.[9] In *Forsyth v. City of Hammond,* 166 U.S. 506, 17 S. Ct. 665 (1897), the court recognized that questions may arise under the Constitution which the Supreme Court would be required to decide, but stated:

> "It is for the state to determine its political subdivisions, the number and size of its municipal corporations and their territorial extent. These are matters local in nature in which the nation as a whole is not interested, and in which by the very nature of things, the determination of the state authorities should be accepted as authorative and controlling."

2 *Equal Protection and Due Process of Procedure.*

A. Division of Territory:

Appellants contend that the division of the territory into two zones and the holding of two elections (one for each zone) violated their constitutional rights guaranteed by the Fourteenth Amendment. They argue that the effect of the division was to dilute voting strength of the residents of the annexed area (which they assume overwhemingly favored annexation) would carry the election favorably. Such contentions were mere allegations denied by Appellees and not supported by any proof whatsoever that this was either the motive for the division or effect of the election results.[10]

[9] *Gomillion v. Lightfoot,* 364 U.S. 339, 81 S. Ct. 125, 5 L. Ed. 2d 110 (1960).

[10] Appendix, pages 18a where opinion recites no proof or evidence was offered by plaintiffs in trial court.

As ordinances are regarded as state law by the Federal Courts where their validation has been sustained by state Courts,[11] the only basis for this appeal is to determine if the state law and city ordinances violated constitutional guarantees of the United States. It has been determined by the State Supreme Court that the methods of the election meet the requirements of Florida and the Constitution of Florida. A close analysis of the Legislative Act and the Ordinance reveals no violation of due process or the equal protection of the law clause of the Federal Constitution.

The plenary power over municipalities given to the Legislature by the Constitution of the State of Florida includes the power to annex territory by such act[12], which may (a) affect the annexation upon becoming law without further procedures, or (b) empower the municipality to use methods provided by general statutes[13], or (c) provide for it to take effect upon the happening of a contingency, or (d) provide special procedures for the municipality to employ.

[11] See *John P. King Mfg. Co. v. City Council of Augusta,* 277 U.S. 100, 48 S. Ct.489 (1928)The assailants of a statue have the burden of proving everything essential to their case. *Pullman Co. v. Knott,* 235 U.S., 23, 25, 35 S. Ct. 2, 59 L., Ed. 105.

[12] See *State v. Miami,* 101 Fla. 292, 134 So. 608 (1931).

[13] Florida Statutes, Section 171.04 (1963).

B. Failure to give notice

Appellants contend that their rights of due process have been violated by the failure to give published notice of the election within twenty-two days before the election is completely without merit. Chapter 29326, Laws of Florida, 1953, provides that notice be given by publishing the Mayor's Proclamation (containing copy of the ordinance) once a week for four consecutive weeks prior to the date of the election, the first publication to be not more than two weeks after adoption of the ordinance. It is not contended by Appellants that Appellees failed to meet these statutory requirements of notice, but that a different type of notice must have been given in a more timely manner. As this Court has repeatedly recognized, annexation may be accomplished without any notice whatsoever, and the failure to give notice does not invoke here the due process or the equal protection of the laws clause of the Federal Constitution. The Supreme Court of Florida confirmed that the notice requirements of the Florida law have been compiled with, and that any other notice that might have been given was directory only and not mandatory.

In *Covey v. Town of Somers*, 351 U.S. 141, 70 S. Ct. 724, cited by Appellants, this Court held that published notice was insufficient applied to a known incompetent to bar the rights of an incompetent. We have no quarrel with this decision for no claim or assertion is made that any of the Appellants were incompetent and did not in fact receive notice of the election.

In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, this Court held insufficient of due process a published notice to

known beneficiaries of a trust fund in a judicial settlement of accounts. But the Court said:

> "The Court has not committed itself to any formula achieving a balance between these interested in a particular proceeding or determining when constructive notice may be utilized or what test it must meet. Personal service has not in all circumstances been regarded as indispensible to the process due to residents, and it has more often been held unnecessary as to non-residents. We disturb none of the established rules on these subjects. No decision constitutes a controlling or even a very illuminating precedent for the case before us . . . "

In both the *Mullane* case and the *Covey* case, the Court initially concluded that notice was essential, contrary to the case now at bar where the legislature may act without any notice whatsoever to the residents annexed. A valid annexation of territories to a municipality in Florida may take place upon the enactment of a special act, requiring no referendum or election or further notice to effect the annexation. It is significant to note that Appellants have not contended that they did not have actual notice of the election, and no proof was submitted to support any lack of knowledge of the election.

In *Lambert v. Peoples, State of California,* 355 U.S. 225, 78 S. Ct. 240, this Court held that actual notice or probability of knowledge was necessary before a conviction under felon registration ordinance could stand; but again the Court was careful to limit the application to the particular case and did not establish a rule that would apply to other cases at issue.

Neither is it contended by Appellants that the effect of the annexation circumvented a federally protected right as in *Gomillion v. Lightfoot,* Supra. The annexation election was held pursuant to special procedures authorized by the laws of Florida.[14] More safeguards to protect the rights of all interested inhabitants of both the city and proposed annexed area were given than might have been legally accomplished through an act of the Legislature, or by other means of annexation approved by the State of Florida.[15]

Appellants contend that the doctrines of *Baker v. Carr,* 369 U.S. 186 (1962) should be applied to relieve their "political discriminations" and protect themselves from "unwarranted and arbitrary annexation procedures" imposed by an inept state legislature controlled by the urban block. It would be sufficient to conclude that the issues of *Baker v. Carr* are not even remotely related to the contentions of Appellants; but even if the principals were similar, the case at bar falls far short of a showing that the procedures were arbitrary or discriminatory in any manner and that the Supreme Court of Florida ignored the protections afforded by the Fourteenth Amendment in holding the election valid. As stated above, the Federal Courts have not failed to declare unconstitutional, unwarranted and arbitrary annexations, nor has this Court neglected to set aside the alteration of municipal boundaries where founded upon political discrimination,[16]

[14] *MacGuyer v. Tampa,* 89 Fla. 138, 103 So. 418 (1925).

[15] See *Hunter v. City of Pittsburgh, Pennsylvania,* supra. For example, annexation might become effective upon a petition of the majority of the residents of the area without any notice to those who did not join in the petition.

[16] *Gomillion v. Lightfoot,* supra.

VI. THE JUDGEMENT RESTS ON ADEQUATE NON-FEDERAL BASIS

1. State law

The Supreme Court Court of Florida, in the opinion from which this appeal was taken, held that Chapter 29326, Laws of Florida, 1953, was a valid enactment of the Legislature of the State of Florida under the Florida Constitution (and also not a violation of any provisions of the Federal Constitution), and that Ordinance No. 238, enacted by the City Council of Ocala, Florida, was a valid ordinance pursuant to said Act of the Legislature.

As it is generally stated, the decision of the highest court of a state construing and upholding the validity of an act of the Legislature of that state and a municipal ordinance enacted pursuant thereto, is binding upon the federal judiciary. [17]

> "The decision of the Court of last resort that a municipal ordinance is within the scope of the power conferred on the municipality by the legislature is conclusive upon this Court.
>
> "Where the state Court has held that an ordinance is within the power conferred on the municipality, it must be regarded as a state law within the meaning of the Federal Constitution.

In *Williams v. Mayor and City Council of Baltimore* 289 U.S. 36, 58 S. Ct. 431 (1933) this court said:

[17] *Cromwell-Franklin Oil Co. v. Oklahoma City* (D. C. Okla.), 14 F. 370, citing *Reinman v. Little Rock*, 237 U.S. 171, 35 S. Ct. 511, 59 L. Ed. 900:

"A municipal corporation, created by a state for better ordering of government has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator."

And in *Rietz v. Chicago R. I. & P. RY Co.* 270 U.S. 378, 46 S. Ct. 236 (1926).

"Power of state and its agencies over municipal corporations within its territory is not restrained by Fourteenth Amendment."

VII. CONCLUSION

In the annexation procedures full compliance was made to state laws. Appellants have failed to show that their rights under the Fourteenth Amendment or due process or equal protection of the law have been violated. This appeal does not involve a substantial federal issue, for it rests upon the adequate determination of the Florida Supreme Court that the procedures effecting annexation were properly exercised and that neither the ordinance or state law under which the procedures were based violated the Constitution of Florida or the United States.

The appeal should be dismissed.

Respectfully submitted,

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Attorney for Appellees

APPENDIX

IN THE

Supreme Court of the United States

October Term, 1965

No.

HERBERT J. SMITH, ET AL., *Appellants*

v.

WILLARD AYRES, Mayor, etc., ET AL., *Appellees.*

On Appeal from the Supreme Court of Florida

MOTION TO DISMISS

Come the Appellees, by and through their undersigned counsel of record, and move this Court to dismiss the appeal upon the following grounds:

1. The issues in this cause do not present a substantial federal question.
2. The judgment entered herein by the Trial Court and the Supreme Court of Florida rests on an adequate non-federal basis.

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Ocala, Florida

Attorney For Appellees

LAWS OF FLORIDA, 1953

Chapter 29326

AN ACT providing an additional and alternative method of procedure for extending the corporate limits of the City of Ocala, Florida; providing the procedure therefore, and certain privileges and immunities to be enjoyed by the owners of property annexed hereunder to the City of Ocala, and repealing Chapter 22409, Laws of Florida, 1943.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF FLORIDA:

Section 1. Subject to the limitations and requirements of this act, the corporate limits of the City of Ocala, Florida, as from time to time existing, may at any time be extended so as to include any adjacent territory. This act shall not be construed to prohibit said city from electing, when qualified, to extend its corporate limits under the provisions of Section 171.05, Florida Statutes, 1941, or any other law now or hereafter in force, nor the same be construed to require said city to proceed under Section 171.05, or any other law now or hereinafter in force, when and if qualified so to do, it being the purpose hereof to provide an additional and alternative method and procedure for the annexation of territory by said city.

Section 2. In order at any time to effect the annexation to said city of any part of the territory subject to be annexed under the provisions of this Act, it shall be necessary:

(a) That an ordinance be passed by the council of said city and approved by the Mayor, or duly passed over his veto, specifying (1) a legal description of the territory proposed to be annexed, (2) the date upon

which the hereinafter required election shall be held, (3) the date upon which the annexation shall become effective, which date shall correspond with the date of the fiscal year of said city next commencing after such election, (4) such special terms and conditions, if any, as are not embraced in this Act, and which may relate to the rights of persons and property to be affected by the proposed annexation of territory, (5) and such ordinance shall provide for and call an election as hereinafter provided, to determine whether the territory described in said ordinance shall be consolidated with and merged into said city, (6) shall specify the place for registration of persons desiring to register for the purpose of voting at such election, and (7) shall specify the place or places within the then existing boundaries of said city where the polling place or places shall be located for such election.

(b) The election herein provided for shall be held in accordance with the powers granted to said city concerning the holdin of elections pursuant to Chapter 7676, Laws of Florida, Acts of 1917. No person shall vote at such election who does not own the legal or beneficial title to at least an undivided one-fifth interest in real property, the area of which is not less than 2,500 square feet, located within the existing territorial limits of said city or within the territory proposed to be annexed to the territorial limits of said city, provided that no person shall vote in such election unless he or she is duly registered upon the registration books of the City of Ocala or upon the registration books to be provided for the registration of persons in the territory to be annexed desiring to qualify to vote at such election.

(c) There shall be provided at the place specified in the annexation ordinance the registration books of said city for the registration of persons in said city possessing the qualifications to vote at elections

in said city, and also registration books for the registration of persons in the territory proposed to be annexed possessing the qualifications to vote in elections in said city had the territory proposed to be annexed theretofore been included within the corporate limits of said city, and such registration books shall be kept open for registration of voters desiring to vote at said election until ten days prior to the time of said election, after which no person shall be entitled to register to vote at said election. Persons who are qualified electors of said city according to the then existing registration books thereof shall, if otherwise qualified, be entitled to vote at any election herein provided for without necessity for re-registration.

(d) Said elections shall be conducted and the expenses thereof paid for by said city.

(e) The form of the election ballots to be used at such election shall be substantially as follows:

OFFICIAL BALLOT.

Shall there be consolidated with and be merged into the corporate limits of the City of Ocala, Florida, the territory proposed to be so consolidated and merged by Ordinance of said City adopted .....

.....

(Insert Date)

Make a cross mark (x) before your choice.

.....FOR MERGER

.....AGAINST MERGER

(f) The Mayor's proclamation calling such election shall obtain a copy of the ordinance hereinbefore required, and such proclamation shall be published once a week for four consecutive weeks (Four publications being sufficient) prior to the date of such election in a newspaper of general circulation pub-

lished in said city, the first publication thereof to be not more than two weeks after the date of adoption of said ordinance.

(g) The results of any such election shall be certified to and canvassed by the City Council of said city, and if a majority of those voting at said election shall vote in favor of the annexation of the territory proposed to be annexed to said city, such additional territory shall stand annexed to and be a part of the territory of said city, and said council shall cause a certified copy of the Mayor's proclamation aforesaid, and a certificate of the result of such election, to be recorded in the records of said council, and also in the office of the Clerk of the Circuit Court of Marion County, Florida.

Section 3. Any territory added to said City hereunder shall not be liable for, or taxed, to pay any general obligation bonds of said city outstanding at the time such annexation becomes effective, nor shall personal property at the time of the calling of said election in good faith located upon property in the territory so annexed be liable or taxed for such general obligation bonds. The City Council shall adopt such reasonable rules and regulations as may be deemed necessary to permit the owners of personal property to be entitled to this exemption.

Section 4. No homestead as provided for in Article X of the constitution, shall be reduced in area on account of its being included within the limits of said city.

Section 5. Any real property upon which a lawful business is being conducted at the time the same is taken into the corporate territory of said city shall, during the continuance of such business the same shall be immune from the operation of any ordinance or law tending to prohibit the conduct of such business at such location.

Section 6. If any sentence, clause, section, subsection or provision hereof shall be held to be unconstitutional for any reason, the same shall not be held to invalidate the remaining portions of this act.

Section 7. Chapter 22409, Laws of Florida, 1943 is hereby repealed.

Section 8. This act shall take effect immediately upon its becoming a law.

ORDINANCE NO. 238

An Ordinance Providing For A Special Election To Determine the Annexation of Areas To the City of Ocala, Providing For the Date Such Election Shall Be Held, the Place of Registration, the Places of Voting and the Qualifications of Electors.

BE IT ORDAINED BY THE CITY COUNCIL OF OCALA, in regular session, as follows:

Section 1. There is hereby provided for and called an election to be held by the qualified electors to determine whether the territory hereinafter described shall be consolidated with and merged into the City of Ocala.

Section 2. The legal description of the areas proposed to be consolidated with and merged into the City of Ocala, reflecting the boundaries thereof, are as follows:

ZONE I: Beginning at the North right of way line of State Road No. 40 (Silver Springs Boulevard) at its intersection with the existing city limits of the City of Ocala, Florida, thence run Northeasterly along said North right of way line of State Road No. 40 to its intersection with the East boundary of Section 2, Township 15 South, Range 22 East, thence South along the Eastern boundary of Sections 2, 11, 14 and 23, Township 15 South, Range 22 East, to an intersection with an imaginary line parallel to and 200 feet South of

the center line of 17th Street projected East, thence West along said imaginary line parallel to and 200 feet South of the center line of 17th Street to its intersection with the existing city limits boundary on Lake Weir Avenue, thence along the existing city limits to the point of beginning.

ZONE II: Beginning at a point 200 feet West of the point of intersection of the center line of the right of way of McDonald Avenue and 24th Street, thence run Northerly along an imaginary line parallel to and 200 feet West of the center line of 24th Street to the intersection of a line parallel to and 200 feet North of a Westerly projection of the center line of Baldwin Road, thence East along an imaginary line to its intersection with the East boundary of Section 2, Township 15 South, Range 22 East, thence South along the East boundary of Sections 2 and 11, Township 15 South, Range 22 East, to the South right of way line of State Road No. 40 (Silver Springs Boulevard), thence Southwesterly along said South right of way line to its intersection with the existing city limits, thence along the existing city limits to the point of beginning.

Section 3. Said election shall be held on March 17, 1964.

Section 4. No person shall vote in such election who does not own the legal or beneficial title to at least an undivided one-fifth interest in real property, the area of which is not less than 2500 square feet, located within the existing city limits of the City of Ocala, or within the territory proposed to be annexed to the territorial limits of the City of Ocala, and who shall not execute the affidavit at the time of casting a ballot as hereinafter provided; and no person shall vote in such election unless he or she is duly registered upon the registration books of the City of Ocala or upon the registration books to be

provided for the registration of persons in the territory proposed to be annexed desiring to qualify to vote in such election. No person shall vote in such election who, in addition to the foregoing qualifications, does not possess qualifications to vote in elections for the City of Ocala had the territory proposed to be annexed theretofore been included within the corporate limits of the City of Ocala. No person shall vote in such election who is not either a resident of the City of Ocala or of either of the areas proposed to be annexed, as aforesaid, to the City of Ocala.

Section 5. Registration books for persons possessing the qualifications to vote in said election shall be maintained in the office of the Supervisor of Registration of Marion County, Florida, in the Courthouse at Ocala, Florida, and such registration books shall be opened at 9:00 o'clock A.M. on February 3, 1964, and closed at 5:00 o'clock P.M. on March 7, 1964. After the closing of the registration books no person shall be entitled to register to vote or to vote at said election. Persons who are qualified electors of the City of Ocala according to the existing registration books thereof at the time of the final adoption of this ordinance shall, if otherwise qualified, be entitled to vote in said election without necessity for re-registration. Separate registration books shall be provided for electors qualifying to vote upon the ballot pertaining to Zone I, and those qualified to vote upon the ballot pertaining to Zone II.

Section 6. All persons qualified to vote shall cast their ballot to vote in said election at the building known as "Kat's Korner" located at 103 South Tuscawilla Street in the City of Ocala, Florida.

Section 7. The forms of the ballots to be used in said election (to be inserted on voting machines, if used) shall be as follows:

(a) For persons registered and qualified to vote as a resident of Zone I, and for registered and qualified residents of the City of Ocala, Florida, having no ownership of real property in the City of Ocala, but an interest in real property in Zone I, as defined in Section 4 above:

OFFICIAL BALLOT

(Special Election of City of Ocala, March 17, 1964)

Shall there be consolidated with and be merged into the corporate limits of the City of Ocala, Florida, the territory proposed to be consolidated and merged by ordinance of said City adopted January 21, 1964, and described therein as Zone I (area South of State Road 40).

Make a cross mark (X) before your choice.

.....For Merger

.....Against Merger

(b) For persons registered and qualified to vote as a resident of Zone II, and for registered and qualified residents of the City of Ocala, Florida, having no ownership of real property in the City of Ocala, but an ownership of real property in Zone II, as defined in Section 4 above:

OFFICIAL BALLOT

(Special Election of City of Ocala, March 17, 1964)

Shall there be consolidated with and be merged into the corporate limits of the City of Ocala, Florida, the territory proposed to be consolidated and merged by ordinance of said City adopted January 21, 1964, an described therein as Zone II (area North of State Road 40).

Make a cross mark (X) before your choice.

.....For Merger

.....Against Merger

(c) For persons registered and qualified to vote who are residents of the City of Ocala owning an interest in real property as defined in Section 4 above, within the limits of the City of Ocala:

OFFICIAL BALLOT

(Special Election of City of Ocala, March 17, 1964)

Shall there be consolidated with and be merged into the corporate limits of the City of Ocala, Florida, the territory proposed to be consolidated and merged by ordinance of said City adopted January 21, 1964, and described therein as Zone I (area South of State Road 40).

Make a cross mark (X) before your choice.

.....For Merger

.....Against Merger

Shall there be consolidated with and be merged into the corporate limits of the City of Ocala, Florida, the territory proposed to be consolidated and merged by ordinance of said City adopted January 21, 1964, and described therein as Zone II (area North of State Road 40).

Make a cross mark (X) before your choice.

.....For Merger

.....Against Merger

Any registered voter who is a resident of the City of Ocala and not the beneficial owner of an interest in real property as hereinabove specified in Section 4 within the existing boundary of the City of Ocala, but is the owner of such interest in the areas proposed to be annexed, shall be entitled to vote in the city polls only upon the question pertaining to the area in which he or she owns such beneficial interest in real property, and the ballot in such case shall

provide for only such vote. Any modifications in the form required for the adoption of this ballot and use in voting machines shall be permissible.

Section 8. Prior to casting his or her ballot on the date of the election, persons entitled to vote shall execute before an election clerk an affidavit in the form prepared by the Supervisor of Registration reflection the qualifications of the elector as an owner of property, as specified in this ordinance, either within the City of Ocala, or within the area to be annexed.

Section 9. All persons who are registered and qualified to vote at the time of receiving the ballot and prior to the casting of their ballot sign a signature identification slip on forms to be provided by the election officers and such election officers shall certify that the signatures were signed in his or her presence during voting hours and compares with the signature on the registration books approved for voting in the City of Ocala or in Zone I or Zone II as the case may be. Such signature identification slip shall also designate thereon for the qualified electors in the City of Ocala the representative questions which the electors shall be qualified to vote upon in the election.

Section 10. All expenses in connection with said election, including but not limited to printing costs, extra clerical help, services for the supervisor or registrar of Marion County, Florida, the cost of providing election officials and other expenses in connection with said election shall be paid from the contingent general fund of the City of Ocala.

Section 11. Subsequent to the adoption of this ordinance the mayor of the City of Ocala shall issue a proclamation calling for the election as herein pro-

vided and a copy of said proclamation, together with this ordinance shall be published once a week for four (4) consecutive weeks prior to the date of said election in a newspaper of general circulation published in the City of Ocala, Florida, the first publication to be not more than two (2) weeks after the date of adoption of this ordinance.

Section 12. The results of this election shall be certified to and canvassed by the City Council of the City of Ocala, and if a majority of those voting for said election shall favor the annexation of the territory described in Zone I above to be annexed to and to be a part of the territory of the City of Ocala, and/or if a majority of those voting at said election shall vote in favor of the annexation of the territory described as Zone II above to be annexed to the City of Ocala, such additional territory, or either of them, as the case may be, shall be annexed to and be a part of the territory of the City of Ocala effective as of October 1, 1964, and a certified copy of the mayor's proclamation aforesaid and a certificate of the resulting election shall be recorded in the records of the City Council of Ocala, and also the office of the Clerk of the Circuit Court of Marion County, Florida.

Section 13. Any qualified elector who shall be absent on the date of election from Marion County, Florida, or who is physically incapabe of appearing at the polling places, or who on account of the tenets of his religion cannot attend the polls on the day of the election may make application to the Supervisor of Registration of Marion County, Florida, or her deputies, at the registration office maintained by the said supervisor in the courthouse at Ocala, Florida, either in person or by mail, at any time during the 45 days preceding said election, but

not later than 5:00 o'clock P.M. on the fifth day preceding such election, upon a blank to be furnished by said supervisor for the official ballot to be voted on at such election. The application blanks shall be sent immediately, by mail, or delivered by hand, to the absent elector; provided, however, that the absent elector who cannot attend the polls on the day of the election on account of the tenets of his religion must make application only in person, and haye application delivered by hand only. The procedures to be followed by the said supervisor of registration and the electors shall be as provided in Section 101.61 through 101.70, Florida Statutes, 1961, to which reference is made as if incorporated herein.

Section 14. Within not less than fifteen nor more than twenty days prior to the date of said election the Clerk of the City of Ocala shall cause to be published in a newspaper published in the City of Ocala a notice of the election. Said notice shall state the purpose of the election as herein set forth, the time and place of the election, the inspectors and clerks of such election as appointed by the City Council of Ocala, and the qualifications of the electors as provided herein.

Section 15. All provisions of Chapter 10 of the Code of Ordinances of the City of Ocala governing elections, except as modified herein and as are applicable to the purposes of this special election, shall apply to the voting procedures, and in any provisions not covered herein or by the provisions of said election code, the laws of the state of Florida in force shall be applicable and shall govern.

Section 16. The annexed areas or territories shall have the same zoning classification as prescribed by the zoning ordinance and regulations of Marion

County, Florida, and if none, the same classification as the nearest adjacent territory is to the territory limits of the City of Ocala at the time of said annexation, provided that no lawful business being conducted at the time the same is taken into the corporate limits of said city, shall, at the time of such business be affected by the operation of any ordinance or provision of the City Code prohibiting or tending to prohibit the conduct of such business at such location. In the event said election shall be favorable to either or both of said Zones I and II, all public property, rights and franchises in the territoy so annexed shall thereafter belong to the City of Ocala, and the property and inhabitance (sic) of the property so annexed shall be consequently liable for all debts and obligations and subject to all species of taxation imposed upon the inhabitants of the City of Ocala; provided, however, that the real estate or other property which may be within the territory so annexed at the time of the effective date of such annexation shall be not liable for nor taxed to pay any bonded indebtedness of the City of Ocala to which it is annexed.

Section 17. In the event that the City of Ocala should hold an election for the approval or disapproval of bonds which might be issued after the proposed annexation becomes effective, then all residents of the annexed areas qualified to vote in said bond election shall have the right and privilege of qualifying and voting in such bond election in the same manner as residents and citizens living within the existing corporate limits of the City of Ocala. The results of said bond election shall be binding upon persons residing in the annexed areas and their property shall be liable to taxation for the payment of said bonds to the same extent as the property of

residents of the present incorporated area of the City of Ocala subject to the provisions of this ordinance as though the said election and other preliminary steps leading up to the issuance of bonds had been taken after the effective date of the annexation.

Section 18. This ordinance shall take effect upon its adoption and approval of the mayor, or upon its becoming law without such approval.

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A.D. 1965

Case No. 33,948

HERBERT J. SMITH, et al., *Appellants*
v.
WILLARD AYRES, MAYOR, etc., et al., *Apellees.*

Case No. 33,948-A

HERBERT J. SMITH, et al., *Apellants,*
v.
WILLARD AYRES, MAYOR, etc., et al., *Apellees.*

Case No. 33,948-B

VERNON NEIL, et al, *Apellants,*
v.
WILLARD AYRES, MAYOR, etc., et al., *Appellees.*

Opinion filed April 28, 1965

Appeals from the Circuit Court for Marion County, D. R. Smith, Judge

Scruggs & Carmichael, for Apellants

Sturgis & Ritter, for Appellees

PER CURIAM.

This appeal comes directly to this Court under Article V, Section 4(2), of the Florida Constitution, authorizing an appeal to this Court from "final . . . decrees directly passing upon the validity of a state statute. . . ."

These consolidated cases questioned the constitutionality of Chapter 29326, Laws of Florida, 1953, authorizing the City of Ocala to annex adjacent territory as well as the legality of the procedure adopted by the City in holding and conducting said election and declaring the results thereof. In view of our conclusion that the final decree of the able chancellor below correctly decided each issue presented and that no useful purpose would be served by an extended opinion of this Court, we quote in full the pertinent parts of said final decree:

"1. Chapter 29326, Laws of Florida, 1953, provides a method of annexation of territory by referendum to the corporate limits of the City of Ocala, Florida. The act requires the enactment of an ordinance by the city council describing the territory proposed to be annexed, the date of the election, the effective date of the annexation (if successful) and other terms and conditions. The act also requires that the ordinance provide for and call an election, and that the mayor's proclamation containing a copy of the ordinance and calling such election be published once a week for four consecutive weeks prior to the date of such election in a newspaper of general circulation published in the City of Ocala.

"2. As required by the aforesaid act, the city council of the City of Ocala enacted Ordinance No. 238 which set forth the requirements of the election as provided by the act, and the mayor's proclamation calling for the election was published as provided by the statute. This ordinance also contained a provision that notice of the election be given by publication in a newspaper within not less than fifteen or more than twenty days prior to the date of the election. The ordinances of the city also provided for a notice to be given in special elections published as aforesaid prior to the date of the election. Defendants' pleadings admit that the latter (both of which

were identical and to which reference was made by Ordinance No. 238) were not published.

"3. At the commencement of the final hearing defendants waived any objections to the qualifications of plaintiffs and admitted that they were competent as alleged in Paragraph I of the complaints. Plaintiffs thereupon rested their case without presentation of testimony or further evidence, and this cause was submitted to the determination of the Court upon the pleadings and the admissions of fact and the law applicable to the issues.

"All other issues having been determined previously, there remained in this final hearing for the Court to resolve the following questions of law:

"I. Was the publication of the notice of election as prescribed in Ordinance No. 238 and as contained in the code of ordinances of the city mandatory to the extent that a failure to publish the same as provided rendered the election of March 17, 1964, and the results null and void?

"II. Is Chapter 29326, Laws of Florida 1953, unconstitutional under the constitution of the State of Florida or the constitution of the United States of America because of ambiguity in the language of the act or because of repugnancy to the due process and equal protection of the law clauses?

"III. Did the procedures adopted by Ordinance No. 238 exceed the authority of the act thereby depriving plaintiffs of the equal protection of the laws and due process of law guaranteed under the constitution of the state of Florida and of the United States of America?

"The Court has decided all other pertinent questions of law favorably to defendants, and the arguments of counsel for both parties were directed to

the above numbered questions. Each of the foregoing must be answered in the *negative* and the relief prayed for by plaintiffs denied in both cases.

"Upon the first question, the pleadings admit (and it was not denied by plaintiffs) that the *statutory* requirements of notice, that is, the publication of the mayor's proclamation (containing a copy of the ordinance required by the act of the legislature) calling for the election was made as provided by the act of the legislature. No other notice or different type of notice was required or specified by Chapter 29326. The City of Ocala as a municipal corporation has no power to extend its boundaries in any manner other than that prescribed by legislative enactment,[1] and where that power is delegated it must be exercised in strict accord with the statute conferring it. Thus, the requirements of notice calling an election provided in an act of the legislature are jurisdictional and must be strictly complied with[2], except where the legislative act specifies the date of election. In the case before the Court the publication of the mayor's proclamation was mandatory; it provided the notice to the electors of the holding of the election in the manner, at the time, and upon the terms and conditions fully stated in the ordinance. However, these mandatory requirements are not applicable to the notice of the election as provided in the election code of the city or as contained in Ordinance No. 238, to be given in a later publication. The publication of such later notice was directory only, and if at all required, the failure to publish such notice did not render the election of March 17, 1964, a nul-

[1] Klich v. Miami Land & Dev. Co., (1939) 139 Fla. 794, 191 So. 41; Beaty v. Inlet Beach, Inc., (1942) 151 Fla. 495, 9 So. 2d 735.

[2] Town of Mangonia Park v. Homan, (Fla. App. 160) 118 So. 2d 585; State v. Shields, (Fla. App. 1962) 140 So. 2d 144.

lity and void.[3]

"In the second question of law presented to the Court, plaintiffs asserted the act of the legislature under which the annexation election was held is unconstitutional because of the ambiguity of the language of the act. With this contention the Court cannot agree. It is the duty of the Court to construe this legislation to save it constitutional infirmities. The language of the statute should be so construed, if susceptible of two interpretations, to uphold the validity of the act assailed.[4] Having considered all aspects and provisions of the act, the Court concludes and finds that Chapter 29326 Laws of Florida 1953 is not an unconstitutional act under the constitution of the state of Florida and of the United States of America.

"The third question of law attacks the method by which the city of Ocala applied the annexation election. Plaintiffs contended that the holding of one election called by one ordinance wherein two areas were to be voted upon in two separate ballots was not authorized and was an unconstitutional application of the act of the legislature depriving plaintiffs of the equal protection of the laws and due process of the laws under the constitution of the state of Florida and the United States of America. It was contended that the division of the area into two separate zones and the separation of the ballots deprived those in the annexed area of a vote upon the issue of annexing the other zone, while qualified electors of the city could vote upon both zones. Two separate elections might have been held under separate ordinances following the procedures of Chapter

[3] State v. Burbridge (1888) 24 Fla. 112, 3 So. 869; Town of San Mateo City v. State (Fla. 1934) 158 So. 112; Merrell v. City of St. Petersburg (Fla. 1926) 109 So. 315; Bradford v. City of Columbus (Ind. 1948) 78 N.E. 2d 457; State v. Self (Tex. Civ. App. 1945) 191 S.W. 2d 756; Swift v. City of Phoenix (Ariz. 1961) 367 P. 2d 791; People v. City of Los Angeles (Cal. 1908) 97 P. 311.

29326 and in such case the residents of either of the zones would not be qualified electors unless the effective date had arrived which would have given them the franchise to vote. There was not evidence that the method of voting had any effect upon the results, and it is not incumbent upon the Court to indulge in speculations or hypotheticals in an attempt to find the procedures contrary to law. The act pro-

[4] Fla. Jur. 330-339.

vides that the terms and conditions relating to the rights of persons and property to be affected by the proposed annexation not specified in the act be set forth in the ordinance calling the election. Admittedly, not every application of the law and the procedures that might be prescribed or followed thereunder could be held valid and not contrary to organic law, but the Court does not find that the procedures and methods used in Ordinance No. 238 were repugnant to the authority of the act, not authorized, or in violation of any constitutional rights of the plaintiffs, either under the federal or state constitution.[5]

"The plaintiffs are representative of a large class of persons similarly affected by the annexation proceedings, and the questions raised herein are ones of common and general interest to many persons. As requested by defendants (and not refuted by plaintiffs) the Court determines and finds these proceedings to be a class action for the benefit of all persons affected by said annexation election.

"In view of the foregoing, it is ordered, adjudged and decreed as follows:

"(a) That this court has jurisdiction of the subject matter of this cause and of the parties hereto.

"(b) That the equities of this cause are with the defendants and against the plaintiffs, and the relief sought by plaintiffs be, and the same is hereby, denied.

"(c) That this court declares Chapter 29326, Laws of Florida, 1953, to be not unconstitutional under the laws of the state of Florida and of the United States of America.

Swift v. City of Phoenix, supra. Cf. People v. City of San Jose (Cal. App. 1950) 222 P. 2d 947; State v. City of Columbia (Tenn. 1962) 362 S.W. 2d 219; Garner v. Benson (Ark. 1945) 272 S.W. 2d 442; Village of Kingsford v. Cudlip (Mich. 1932) 241 N.W. 893; Walker v. City of Pine Bluff (Ark. 1948) 214 S.W. 2d 510.

"(d) That this court declares Ordinance No. 238 of the City of Ocala, a municipal corporation under the laws of the state of Florida, to be valid and constitutional enactment pursuant to the provisions of Chapter 29326, Laws of Florida, 1953.

"(e) That this court declares the election of March 17, 1964, held by the City of Ocala pursuant to said Ordinance No. 238 and Chapter 29326, Laws of Florida, 1953, and the results thereof as reflected by the official canvass to be valid.

"(f) The provisions of this decree shall be binding upon all persons and property within the corporate limits of the City of Ocala and within the territory annexed by said election of March 17, 1964."

We find the foregoing decree to be free from error. It is hereby approved and adopted as the opinion of this Court.

Affirmed.

DREW, C.J., ROBERTS, THORNAL and O'CONNELL, JJ., and MCCORD, Circuit Judge, concur

BARNES (Retired), J., dissents with Opinion

BARNS, PAUL D., JUSTICE (Ret.), Dissenting.

The appellants, as plaintiffs, sought declaratory decrees and other relief in equity against the individual appellees as officials of the City of Ocala and against the City. After answers were filed and pretrial conference, the chancellor, by final decree, found the equities to be with the defendants and against the plaintiffs and that Chapter 29,326, Laws of Florida (1953), was not unconstitutional, thereupon, the plaintiffs appealed. I find error and would reverse.

Appellants, by their complaints, assignments of errors and briefs, contend that Chapter 29,326, Laws of Florida, 1953, is unconstitutional. I agree. Without fixing the limits of any area, Chapter 29,326 provides that the City of Ocala may extend its corporate limits so as to include adjacent territory after the adoption of an ordinance to that effect and approval by a majority of the qualified electors of the City and the area sought to be annexed.

The City passed an ordinance providing for the annexation of two different zones on adjacent territory; and upon referendum, the vote was favorable for annexation. Thereupon, the plaintiffs, being property owners in the two zones sought to be annexed, brought separate actions on like grounds, seeking relief against annexation.

Section 8, Article VIII of the Constitution of Florida, provides that, "The Legislature shall have power to establish, and to abolish municipalities to provide for their government, to prescribe their jurisdiction and powers, and to alter and amend the same at any time." The City of Ocala was chartered by Chapter 7676, Laws of Florida, 1917, which charter defined its powers and fixed its jurisdictional boundaries as to territory.

State ex rel. Davis v. City of Homestead, 1930, 100 Fla. 354, 130 So. 28, held that, "where the jurisdiction and boundaries of a municipality are fixed

by statute, they may be extended at any time by statute, but not otherwise as the law now is" and that the City's attempt to annex adjacent territory was ineffective. In that case, boundaries of the City of Homestead had been fixed by a legislative act and the City attempted to extend its boundaries pursuant to Chapter 6940, Acts 1915, and the court held that this general law of 1915, authorizing extension of corporate limits, applied to self-created municipalities and not to those municipalities whose powers and jurisdiction were fixed by a special act of the Legislature pursuant to Section 8, of Article VIII of the Constitution, citing Pursley v. City of Fort Myers, 87 Fla. 428, 100 So. 366.

Pursley v. Fort Myers, supra, likewise involved proceedings by which the City, under authority of Chapter 6940, supra, attempted to enlarge its powers and this Court held that: "Section 8 of Article VIII of the Constitution empowers the Legislature to establish and to abolish municipalities, to provide for their government, and to prescribe their jurisdiction and powers and to alter and amend the same at any time, is an *exclusive* assignment of power to the Legislature" (italics supplied). Hence, the City could not enlarge its powers under the general law.

Klich v. Miami Land and Development Co., Fla. 1939, 191 So. 41, held that the attempt of the Town of Florida City to extend its boundaries was void *ab initio*. The Town was originally self-incorporated under the general law which incorporation was ratified and confirmed by Chapter 7158, Special Acts, 1915, providing that, "The said Town of Florida City is hereby declared to be a legally incorporated town with all the powers, privileges, rights and franchises conferred upon such towns by the General Laws of the State of Florida." Section 1 of Chapter 6940, Acts, 1915, (now Section 166.01, F.S.A. of the general laws) provided that, "Every city and town in

the State of Florida, whether incorporated by a special act or under the general laws of the State relating to cities and towns . . . may extend its territorial boundaries as provided by law." The court held that upon the legislature confirming and approving the self-incorporation charter by the special act, the Town became incorporated as a statutory municipality under Section 8 of Article VIII of the Constitution and that the attempted extension of its boundaries was void, citing State ex rel. Davis v. City of Homestead, 100 Fla. 361, 130 So. 28, for authority.

In creation of a municipality there is nothing more fundamentally essential than the fixing of its territorial jurisdiction; and it is likewise fundamental that when the Legislature has enacted a law that only the Legislature may amend it. To annex territory to the corporate limits of a municipality would enlarge its jurisdiction and when the territorial limits have been fixed by law, they can only be altered by law. The decisions in the *Homestead, Fort Myers,* and *Kilch* cases, above cited, holding that the legislative established charters of the municipalities involved could not be altered except by the Legislature, are well supported by the principle of law prohibiting the delegation of legislative power. As stated in 6 Fla. Jur., Constitutional Law, § 147, p. 393:

> "It is fundamental that the Legislature may not, except when authorized by the Constitution, delegate its legislative power, that is, the power to enact laws or to declare what the law shall be or to exercise an unrestricted discretion in applyin applying a law. Unlawful delegations of legislative power are ineffectual, and in appropriate proceedings, an invalid attempt to delegate legislative power may be adjudged by the courts, whereupon the Constitution by its superior force renders the enactment inoperatie."

However, as stated in 6 Fla. Jur., Constitutional Law, § 148, p. 394:

> "While the Legislature cannot delegate its power to make a law, it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend."

It is my conclusion that Chapter 29,326, Laws of Florida, 1953, attempts to delegate legislative power to amend the legislative charter of Ocala as to its jurisdiction and is unconstitutional and void.

I would reverse and remand for proceedings not inconsistent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that forty (40) copies of the foregoing motion have been mailed to the Clerk of the Supreme Court of the United States, Washington, D. C., and a copy forwarded to Robert J. Corber, Esquire, 1250 Connecticut Avenue, N. W., Washington, D. C. 20036, by air mail, postage prepaid, and a copy to Parks M. Carmichael, Post Office Box C, Gainesville, Florida 32601, by mail this 16th day of November, 1965.

Wallace E. Sturgis, Jr.
Attorney for Appellees